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Op. No. 68-30

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

November 4, 1968

Mr. Ramon Duran, Executive Officer  
Land Use Commission  
Department of Planning and  
Economic Development  
426 Queen Street  
Honolulu, Hawaii 96813

Re: Restrictions Upon Special Use Permit  
(Kauai Helicopters)

Dear Mr. Duran:

By letter dated October 22, 1968 you requested our opinion as to whether or not the Land Use Commission possesses the power to approve an applicant's Special Use Permit (under §98H-6, Revised Laws of Hawaii 1955, as amended) for a duration in excess of that approved by the county planning commission. We understand that in this case, Kauai Helicopters filed an application with the Kauai County Planning and Traffic Commission in February, 1968 for use of a parcel of land within the State Agricultural District as a heliport; that the County Commission held a public hearing on the matter in April, 1968; that the County Commission approved the application in May, 1968, subject to termination upon June 30, 1969 or upon a determination sooner by the County Commission that such use is hazardous to public safety or a nuisance; and that the Land Use Commission subsequently "voted to approve the Special Permit request of Kauai Helicopters with the condition that the Special Permit application expire at the same time as the applicant's lease of the property -- December 31, 1969".

We think the Land Use Commission does not possess the power to extend a time limitation imposed by a county commission as a condition of its approval of an application for a Special Use Permit.

Op. No. 68-30

Mr. Ramon Duran  
November 4, 1968  
Page -2-

Examination of §98H-6, with relation to the question posed, reveals an unambiguous progression in the procedure necessary to obtain a Special Use Permit; i.e.:

1. "The county planning commission ... may permit certain unusual and reasonable uses within agricultural ... districts other than those for which the district is classified (by the Land Use Commission)";
2. "The county planning commission ... may under such protective restrictions as may be deemed necessary, permit such desired use ...";
3. "A (county planning commission's) decision in favor of the applicant ... shall be subject to the approval of the (Land Use Commission)"; and
4. "Within forty-five days after receipt of the county agency's decision (to approve the application), the (Land Use Commission) shall act to approve or deny."  
(Emphasis added.)

The Legislature has granted the county commissions the specific power to place restrictions upon a use permitted specially under §98H-6. However, no such grant in favor of the Land Use Commission is made. Further, the Land Use Commission is granted no power to review an application for a Special Use Permit where the county commission has denied the application.

We think that the pertinent statutory language, by clearly granting to the county commissions the authority to place restrictions upon special uses approved by them and by omitting a grant of such authority to the Land Use Commission, leads irresistibly to the implication that the Land Use Commission may not remove or relax such restrictions upon its approval of a Special Use Permit.

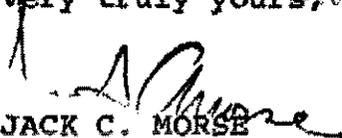
Mr. Ramon Duran  
November 4, 1968  
Page -3-

We therefore suggest that you advise the Land Use Commissioners that they should either:

- (a) Amend their action taken on this application so that the restrictions imposed thereon by the Kauai County Planning and Traffic Commission are incorporated in the Special Use Permit issued by the Land Use Commission; or
- (b) If the Land Use Commissioners feel that Kauai Helicopters should be allowed to operate its heliport until December 31, 1969 (subject to a hazard or nuisance determination as aforesaid) remand the application to the Kauai County Planning and Traffic Commission with such suggestion.

However, please note that under the latter procedure a new public hearing may be required at the county level if the original notice-of-hearing specified a time limitation earlier than December 31, 1969.

Very truly yours,

  
JACK C. MORSE  
Deputy Attorney General

APPROVED:

BERT T. KOBAYASHI  
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Attorney General

Op. No. 68-30